Ng Yen Kok v AmFinance Bhd (formerly known as MBf Finance Bhd and prior to that was known as Arab-Malaysian Finance Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-03–247 OF 2009
ZAINUN ALI (NOW FCJ), RAMLY ALI AND ZAHARAH IBRAHIM JJCA
4 JANUARY 2013

Civil Procedure — Service — Non-compliance of service — Bankruptcy proceedings — Bankruptcy notice not served personally, served on substituted service — Whether notice served to address in indemnity agreement between parties — Whether notice duly served — Filing of creditor's petition after 20 months — Defendant out of jurisdiction when notice served — Whether bankruptcy proceedings defective — Whether creditor's petition still valid after 20 months' delay

In the court below, the judgment creditor ('the respondent') had obtained judgment against the judgment debtor ('the appellant') for the sum of RM534,929.16, in default of appearance by the appellant. The judgment sum was the outstanding amount due under a hire purchase agreement entered into by one Mega-Intech Sdn Bhd with the respondent and the appellant was one of three persons who entered into an indemnity agreement. Based on the judgment and the judgment sum which was unpaid, the respondent commenced bankruptcy proceedings against the appellant. A bankruptcy notice was issued and served on the appellant by way of substituted service. Some 20 months after the purported service of the bankruptcy notice, the respondent filed the creditor's petition. The creditor's petition was also not able to be personally served on the appellant but through substituted service. An affidavit was affirmed stating that the creditor's petition was duly served in accordance with the order for substituted service. Subsequently, a receiving order and an adjudication order ('RO & AO') were granted. The appellant filed summons in chambers applying for a stay of the RO & AO or alternatively to have the RO & AO set aside. It was contended that the appellant had been out of the country between 2001 and 2004 and did not receive any correspondence with regard to the bankruptcy proceedings and had no knowledge of them or of the RO & AO. The application was dismissed. He then appealed to the judge in chambers and the appeal was also dismissed. Hence, the present appeal. The issues that arose in the present appeal were whether the bankruptcy proceedings was defective as the notice was not duly served on the appellant; and the validity of creditor's petition due to the 20 months' delay.

Held, allowing the appeal and setting aside orders:

(1) The bankruptcy notice was not sent to the address of the appellant as

given in the indemnity agreement. Neither was the address on the 'surat akuan mengepos' an address 'given to the company in writing after the execution of this Agreement' as provided for in cl 3(b) of the indemnity agreement. Therefore, the deeming provision in cl 3(b) of the indemnity agreement could not operate so as to cause the posting of the bankruptcy notice to be effective service of the notice three days after such posting. Since the bankruptcy notice was not duly served on the appellant, non-compliance with the terms of the bankruptcy notice cannot constitute an act of bankruptcy by the appellant (see paras 25–26).

(2) Without an act of bankruptcy having been committed by the appellant, the basis for the creditor's petition failed. The alleged act of bankruptcy forming the basis of the creditor's petition occurred, according to the respondent/judgment creditor which was more than six months before the petition was presented. That delay disentitled the respondent from presenting the petition, based on s 5(1)(c) of the Bankruptcy Act 1967. A receiving order and adjudication order granted on the basis of an invalid creditor's petition was invalid. The RO & AO against the appellant must therefore be set aside (see paras 28, 37 & 38).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, pemiutang penghakiman ('responden') telah mendapatkan penghakiman terhadap penghutang penghakiman ('perayu') berjumlah RM534,929.16, atas kemungkiran kehadiran oleh perayu. Jumlah penghakiman merupakan jumlah terkumpul yang perlu dibayar di bawah perjanjian sewa beli yang dimeterai oleh Mega-Intech Sdn Bhd dengan responden dan perayu merupakan salah seorang daripada tiga orang yang memeterai perjanjian tanggung rugi. Berdasarkan penghakiman dan jumlah penghakiman yang belum dibayar, responden memulakan prosiding kebankrapan terhadap perayu. Satu notis kebankrapan dikeluarkan dan diserahkan kepada perayu melalui penyampaian ganti. Kira-kira 20 bulan selepas penyerahan notis kebankrapan tersebut, responden memfailkan petisyen pemiutang. Petisyen pemiutang juga tidak diserahkan sendiri kepada perayu tetapi menerusi penyampaian ganti. Satu afidavit yang disahkan menyatakan bahawa petisyen pemiutang telah diserahkan sewajarnya menurut perintah untuk penyampaian ganti. Sehubungan dengan itu, satu perintah penerimaan dan satu perintah penghakiman ('RO & AO') diberikan. Perayu memfailkan saman dalam kamar memohon untuk satu penggantungan RO dan AO atau secara alternatifnya, untuk mengetepikan RO dan AO. Dihujahkan bahawa perayu tiada di dalam negara di antara 2001 dan 2004 dan tidak menerima apa-apa surat-menyurat mengenai prosiding kebankrapan dan dan tidak tahu menahu mengenainya atau mengenai PP dan PA. Permohonan tersebut ditolak. Dia kemudiannya merayu kepada hakim di dalam kamar dan rayuan tersebut ditolak. Oleh itu, rayuan ini dibuat. Isu-isu yang berbangkit dalam rayuan ini ialah sama ada prosiding kebankrapan dicacatkan

A memandangkan notis tidak diserahkan secara sewajarnya ke atas perayu; dan kesahan petisyen pemiutang disebabkan kelewatan 20 bulan.

Diputuskan, membenarkan rayuan dengan mengetepikan perintah-perintah:

B (1) Notis kebankrapan tidak dihantar kepada alamat perayu seperti yang dinyatakan dalam perjanjian tanggung rugi. Begitu juga dengan alamat pada 'surat akuan mengepos' bukan merupakan alamat 'yang diberikan kepada syarikat secara bertulis selepas Perjanjian ini dimeterai' seperti yang diperuntukkan dalam klausa 3(b) perjanjian tanggung rugi. Oleh itu, peruntukan klausa 3(b) perjanjian tanggung rugi tidak boleh dikuatkuasakan sehingga menyebabkan penampalan notis kebankrapan menjadi penyampaian berkesan tiga hari selepas penampalan tersebut. Memandangkan notis kebankrapan tidak diserahkan sewajarnya ke atas perayu, ketidakpatuhan terma-terma notis kebankrapan bukan merupakan satu tindakan kebankrapan oleh perayu (lihat perenggan 25–26).

(2) Tanpa tindakan kebankrapan dilakukan oleh perayu, asas untuk petisyen pemiutang gagal. Tindakan kebankrapan yang dikatakan merupakan asas kepada petisyen pemiutang menurut responden/pemiutang penghakiman, berlaku melebihi enam bulan sebelum petisyen diserahkan. Kelewatan tersebut tidak memberikan hak kepada responden untuk menyerahkan petisyen tersebut menurut s 5(1)(c) Akta Kebankrapan 1967. Perintah penerimaan dan perintah penghakiman yang diberikan berdasarkan petisyen pemiutang yang tidak sah adalah tidak sah. RO dan AO terhadap perayu seharusnya diketepikan (lihat perenggan 28, 37 & 38).]

Notes

For a case on non-compliance of service, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 7397.

Cases referred to

A Debtor (10 of 1953), Re; Ex Parte the Debtor v Anpthill Rural District Council and Another [1953] 2 All ER 561, Ch D (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(i), 5(1), 5(1)(a), (b), (c), (d)
Bankruptcy Act [UK] s 4(1)(c)
Rules of the Court of Appeal 1994 r 18(2)

Appeal from: Bankruptcy No 29–1117 of 2002 (High Court, Melaka)

R Devadason (Devadason & Devadason) for the appellant.
S Subramaniam (NK Tan & Rahim) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] On 12 December 1998 the respondent ('judgment creditor') obtained judgment against the appellant ('judgment debtor') for the sum of RM534,929.16. The judgment was obtained in default of appearance by the appellant. The writ of summons and statement of claim had been served upon him by way of substituted service.

[2] The judgment sum was the outstanding amount due under a hire purchase agreement entered into by one Mega-Intech Sdn Bhd with the respondent. The appellant was one of three persons who entered into an indemnity agreement ('indemnity agreement') dated 23 March 1996 in respect of the hire purchase agreement.

[3] Based on the judgment of 12 December 1998, and upon the judgment sum remaining unpaid, the respondent commenced bankruptcy proceedings against the appellant. A bankruptcy notice was issued on 28 November 2002.

[4] According to para 4 of the creditor's petition, the bankruptcy notice was served on the appellant on 21 August 2003 by way of substituted service. However, no order for such substituted service was exhibited in the appeal record. The only document in the appeal record which relates to the service of the bankruptcy notice is a 'surat akuan mengepos' (acknowledgment of posting), the date of which is not discernible, addressed to the appellant at 428C Lorong Mawar, Bukit Baru, 75150 Melaka.

[5] On 9 May 2005, some 20 months after the purported service of the bankruptcy notice, the creditor's petition was filed by the respondent.

[6] The creditor's petition was also not able to be personally served on the appellant and an order for substituted service was obtained.

[7] One JB Buddilal a/l Dharmadasa affirmed an affidavit stating that the creditor's petition was duly served in accordance with the order for substituted service, including the posting of the petition at the appellant's premises at 4286C, Lorong Mawar, Bukit Baru, 75150 Melaka on 17 January 2007.

[8] A receiving order and an adjudication order ('RO and AO') were simultaneously granted on 1 November 2007.

[9] On 12 January 2009 the appellant filed summons in chambers applying for a stay of the RO and AO or alternatively to have the RO and AO set aside, on the principal ground that he had been out of the country between 2001 and 2004 and had been working in Abu Dhabi since 2004 and thus did not receive any correspondence with regard to the bankruptcy proceedings and had no knowledge of them or of the RO and AO.

[10] The appellant's application was dismissed. He appealed to the judge in chambers and the appeal was also dismissed.

[11] He then appealed to the Court of Appeal against the dismissal of his appeal to the judge in chambers.

[12] We heard the appeal on 26 March 2012 and allowed the appeal. Our reasons for so doing are set out below.

ISSUES

[13] Having examined the documents in the record of appeal and having read and heard the submissions of both parties, we are satisfied that the main issue in this case is whether the bankruptcy proceedings in this case are defective as the bankruptcy notice was not duly served on the appellant ('issue of service of bankruptcy notice').

[14] We are also troubled by the delay of 20 months between the date the act of bankruptcy allegedly occurred and the presentation of the creditor's petition. We note that this is *not a ground* forwarded by the appellant in his memorandum of appeal. However, we believe that we have the discretion to consider that matter based on sub-r 18(2) of the Rules of the Court of Appeal 1994. We also believe that as that delay raises an issue of law, we should do so. Thus, the second issue we need to deal with is the issue of the validity of creditor's petition due to the delay ('issue of delay in presenting creditor's petition').

ANALYSIS OF ISSUES

Issue of service of bankruptcy notice

[15] The creditor's petition states that it was presented upon the failure of the appellant to comply with the terms of the bankruptcy notice dated 28 November 2002 and served on the appellant on 21 August 2003. The terms in the bankruptcy notice clearly show that it was issued pursuant to para (i) of sub-s 3(1) of the Bankruptcy Act 1967.

[16] According to the creditor's petition, the act of bankruptcy which forms the basis for the petition was committed by the appellant on *8 September 2003*, being 18 days after the purported service of the bankruptcy notice on the appellant.

[17] Paragraph 3(1)(i) of the Bankruptcy Act 1967 states as follows:

> 3(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> …
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has *served* on him in Malaysia, or by leave of the court elsewhere, a *bankruptcy* notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days *after service of the notice* in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; (Emphasis added.)

[18] It is therefore crucial to determine whether the bankruptcy notice had been duly served on the appellant so as to make his non-compliance with the notice an act of bankruptcy.

[19] By cl 3(b) of the indemnity agreement, the appellant (and the other signatories) agreed that the 'service of any summons, writ of summons, originating summons, any notice of legal process and petition can be duly served on me/us by forwarding a copy of the same by prepaid registered post to the address of me/us given herein or at any other address given to the company in writing after the execution of this Agreement and the service is deemed to take effect three (3) days after the date of posting'.

[20] As mentioned above, apart from the 'surat akuan mengepos' there is nothing to show that the bankruptcy notice was served on the appellant in any other manner. There is only the bare statement in the creditor's petition that the bankruptcy notice was served by substituted service.

[21] The respondent's affidavit in reply affirmed by one Shirley Ong Gek Lian mentions that service of the bankruptcy notice was effected by substituted service.

[22] However, while there are exhibited to Ms Shirley Ong's affidavit various documents such as the hire purchase agreement, the indemnity agreement, the writ of summons and statement of claim as against Mega-Intech Sdn Bhd and the three signatories of the indemnity agreement as well as the application and order for substituted service for the writ of summons and the affidavit of such substituted service (which resulted in the judgment in default as against the appellant and the debt being incurred) we found it strange that *the crucial order for the substituted service of the Bankruptcy Notice is not exhibited by the respondent.*

[23] We are thus constrained to conclude that the bankruptcy notice was not served by substituted service but was in fact only sent by post to the address as shown in the 'surat akuan mengepos', namely, 428C Lorong Mawar, Bukit Baru, 75150 Melaka.

[24] Now, the address of the appellant as stated in the indemnity agreement is 4286-C Lorong Mawar, Bukit Baru, 75150 Melaka.

[25] The bankruptcy notice was therefore *not* sent to the address of the appellant as given in the indemnity agreement. Neither is the address on the 'surat akuan mengepos' an address 'given to the company in writing after the execution of this agreement' as provided for in cl 3(b) of the indemnity agreement.

[26] In the circumstances, the deeming provision in cl 3(b) of the indemnity agreement cannot operate so as to cause the posting of the bankruptcy notice to be effective service of the notice three days after such posting.

[27] Consequently, since the bankruptcy notice was not duly served on the appellant, non-compliance with the terms of the bankruptcy notice *cannot* constitute an act of bankruptcy by the appellant.

[28] Without an act of bankruptcy having been committed by the appellant, the basis for the creditor's petition fails. The RO and AO are therefore invalid and must be set aside.

Issue of delay in presenting creditor's petition

[29] There is a delay of some *20 months* between the date the act of

bankruptcy was allegedly committed (8 September 2003) and the date the creditor's petition was presented or filed (9 May 2005).

[30] Under sub-s 5(1) of the Bankruptcy Act 1967, a creditor is not entitled to present a bankruptcy petition against a debtor unless the four conditions set out in paras (a)–(d) of that subsection are fulfilled. The four conditions are:

> (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit,
>
> (b) the debt is a liquidated sum payable either immediately or at some certain future time;
>
> (c) *the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and*
>
> (d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager. (Emphasis added.)

[31] One of the conditions that *must* be fulfilled by a creditor before he is entitled to present a bankruptcy petition against the debtor is that the act of bankruptcy must have occurred within six months before such presentation. It must be noted that that statutory provision in para 5(1)(c) does *not* say 'not less than six months' or 'more than six months'. It clearly requires a creditor who seeks to pursue the course of bankruptcy proceedings against a debtor to act promptly. Otherwise, the creditor loses his entitlement to do so. In other words, the act of bankruptcy ceases to be an 'available act of bankruptcy' as defined in s 2 of the Bankruptcy Act 1967.

[32] The provision of para 5(1)(c) of our Bankruptcy Act 1967 is similar to that of sub-s 4(1)(c) of the English Bankruptcy Act 1914, except that in the latter Act the period is three months. The requirement that a judgment creditor must present the petition within the period stated in the statutory provision was emphasised in the case of *Re A Debtor (10 of 1953); Ex Parte the Debtor v Anpthill Rural District Council and Another* [1953] 2 All ER 561.

[33] In that case, the registrar dismissed, on 10 September 1952, the debtor's application to set aside the bankruptcy notice. The debtor's appeal to the divisional court against the registrar's decision was allowed. The creditor appealed to the Court of Appeal against the divisional court's decision. That

appeal was allowed by the Court of Appeal on 10 February 1953. The Court of Appeal ordered that the registrar's order of 10 September 1952 be restored.

[34] The creditor then presented a creditor's petition on 10 March 1953, this date being exactly six months after the date of the restored order of the registrar. On 1 May 1953 a receiving order was made by the registrar.

[35] The debtor then applied to the divisional court to have the receiving order discharged and the bankruptcy petition dismissed. One of the grounds was that the act of bankruptcy was complete on 10 September 1952, being the date of the registrar's order dismissing the debtor's application to set aside the bankruptcy notice. As the petition was filed more than three months after the act of bankruptcy was committed/completed, that act of bankruptcy was no longer available as a basis for the bankruptcy petition.

[36] The Court of Appeal agreed with the debtor and held that time began to run from 11 September 1952. In other words, on the expiry of three months after that date, the act of bankruptcy ceased to be available as a basis for the presentation of the bankruptcy petition.

[37] In the appeal before us, the alleged act of bankruptcy forming the basis of the creditor's petition occurred, according to the respondent/judgment creditor, *more than six months before* the petition was presented. That delay has disentitled the respondent from presenting the petition. That is abundantly clear from the provisions of para 5(1)(c) of the Bankruptcy Act 1967 and the case of *Re a Debtor* referred to above.

[38] Having become no longer entitled to present a creditor's petition by *8 March 2004*, (the date on which the period of six months from 8 September 2003 expired), the respondent's creditor's petition presented on 9 May 2005 is clearly an invalid creditor's petition. A receiving order and adjudication order granted on the basis of an invalid creditor's petition are invalid. The RO and AO against the appellant must therefore be set aside.

DECISION

[39] Based on our findings on the two issues analysed above, we allowed the appeal and set aside the receiving order and adjudication order against the appellant.

Appeal allowed and orders set aside.

Reported by Afiq Mohamad Noor